PHILEOALLIED BANK (MALAYSIA) BHD

v.

SADDHONA INDRAN SEVAPRAGASAM

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ORIGINATING SUMMONS NO: S2-24-638-1998]
16 JUNE 1999

LAND LAW: *Charge - Notice of demand - Rate of interest - Different dates for calculating interest specified in notice - Whether demand bad in law - Whether amounts to "cause to the contrary" within s. 256(3) National Land Code 1965 - Whether application for order for sale ought to be dismissed*

CONTRACT: *Loan - Terms of loan agreement - Charge to secure overdraft facilities - Whether only terms in letter of offer may be referred to - Whether annexure to charge must be read together with letter of offer - Whether terms in annexure to charge may be resorted to where letter of offer silent*

This was an application for an order for sale by public auction of two pieces of land belonging to the defendant but charged to the plaintiff in respect of an overdraft facility granted by the plaintiff. Pursuant to s. 256(3) of the National Land Code 1965, the defendant resisted this application on two grounds, both of which related to alleged errors in the plaintiff's notice of demand. Firstly, he contended that although there was no provision in the letter of offer for interest to be calculated at monthly rests, the notice of demand had specifically stated that it had calculated the interest on monthly rests. Secondly, the defendant referred to a discrepancy in the notice of demand relating to the rate of interest charged. Whilst one paragraph of the notice stated that additional interest on sums outstanding was to be charged from the date of the notice, the following paragraph, in calculating the additional interest, used a date prior to the date of the said notice of demand. Based on these, the defendant argued that Form 16D as filed and served and which relied on the notice of demand was bad in law.

Held:

[1] The annexure to the charge executed by the defendant must be read together with the letter of offer when the court is to look into the terms of the loan agreement. Therefore, since the letter of offer is silent as to the mode of calculating interest, the court has to fall back on the annexure. Clause 4 of the annexure states that interest shall be at the end of each calendar month and thus, the first ground raised by the defence must necessarily fail.

[2] Upon informing the defendant in the earlier paragraph of the notice of demand that it was intending to exercise its right to impose the additional interest "from the date of this letter", it was wrong of the plaintiff to have calculated the interest to run from an earlier date as stated in the subsequent paragraph. The plaintiff, having made a calculated choice of exercising its right to vary or to levy, cannot willy-nilly in the same letter take a different stand. Either by default or by providential design, the plaintiff had failed to calculate the interest only from the date of the notice of demand as it said it would. Clearly therefore, having based its statutory demand by way of Form 16D on a notice of demand that included interest that the plaintiff was not entitled to by choice, the plaintiff's demand was bad in law.

[Application dismissed with costs.]

Case(s) referred to:
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(refd)***

Legislation referred to:
National Land Code 1965, ss. 256(3), 340

For the plaintiff - WM Chang; M/s Raja, Darryl & Loh
For the defendant - D Krishnan (Annie Maria with him); M/s Ramamoorthy Ledchumiah & Co

Reported by S Dharmendran

JUDGMENT

RK Nathan J:

Facts

This is the plaintiff's application *inter alia* for sale by public auction, 2 pieces of land belonging to the defendant and charged to the plaintiff in respect of an overdraft facility (OD) granted by the plaintiff to the borrower, one Indran s/o Saravanamuthu for RM16,884,000 by way of a letter of offer dated 18 June 1996 and accepted by the borrower by signing on the same letter of offer and on the same day. Subsequently the said sum was increased by RM5,200,000 to RM22,084,000. Three charges were created over the said 2 pieces of land. The 1st charge dated 10 July 1997 was for RM22,084,000 over title No. 31810. The 2nd charge dated 10 July 1997 was for RM16,884,000 over title No. 15468 created before the increase of the OD limit.

The 3rd charge was a second legal charge for RM5,200,000 being the increased sum created over title No. 15468. By letter dated 4 December 1997 the plaintiff gave notice of variation of the interest rate. Two AR notices of demand dated 27 March 1998 and 15 April 1998 were sent to the borrower and to the defendant with the second letter including the demand for penalty interest. Again two AR notices of demand dated 27 March 1998 and 15 April 1998 were sent to the defendant with the second letter including the demand for the additional interest of 1% per annum. The AR cards with acknowledgements were also exhibited. Subsequently the plaintiff filed and served the statutory Form 16D on the defendant. The ground stated therein was non-compliance with the notice of demand dated 27 March 1998 and 15 April 1998.

Findings Of The Court

Monthly Rests

The "cause to the contrary" raised by the defendant in challenging this application for order for sale pursuant to s. 256(3) of the National Land Code (the Code) was to refer to the letter of offer which stipulates that the interest rate was 1.5% per annum over the Base Lending Rate (BLR) which then was 8.9% per annum. It was pointed out to me that there was no provision made for interest to be calculated at **monthly rests** (emphasis provided) whereas in the notice of demand to the borrower dated 27 March 1998 the plaintiff had specifically stated that it had calculated the interest on **monthly rests**.

I find this argument too simple for consideration. It must be patently clear that the annexure to the charge executed by the defendant must be read together with the letter of offer when the Court is to look into the terms of the loan agreement. Clause 50 of the annexure reads as follows:

> 50. **Other Terms And Conditions**
>
> The terms and conditions herein stated shall be in addition to and not in derogation of any specific agreement or arrangement with regard to each banking facility now or hereafter from time to time subsisting between the Bank and the Chargor or any terms and conditions that may be specified in any letter(s) (including any letter(s) of offer) given by the Bank to the Chargor from time to time.

Clause 4 of the annexure states that interest shall be at the end of each calendar month. The said clause reads as follows:

> 4. **Capitalisation Of Interest**
>
> Subject always to the provisions of the section next following the interest on any principal monies for the time being secured by this Charge including capitalised interest shall at the end of each calendar month or such other periods as the Bank may stipulate be capitalised and added for all purposes to the principal sum then owing and shall thenceforth bear interest at the relevant Prescribed Rate and/or at any increased rate and be secured and payable accordingly and all the covenants and conditions contained in or implied by this Charge and all powers and remedies conferred by law or by this Charge and all rules of law or equity in relation to the said principal sum and interest shall equally apply to such capitalised arrears of interest and to interest on such arrears.

It is obvious therefore that since the letter of offer is silent as to the mode of calculating interest, the Court has to fall back on cl. 4. This ground raised by the defence must perforce fail.

In fact I specifically asked both counsel to address me on the meaning to be ascribed to the words "to be serviced at the end of each month" in relation to the interest rate as stated in the letter of offer, as distinguished from cl. 4 of the annexure. It is therefore necessary to reproduce "interest rate" as described in the letter of offer.

Interest Rate:	1.50% per annum over our Bank's Base Lending Rate ("BLR"), herein referred to as the "Prescribed Rate". Interest on the OD Facility is to be serviced at the end of each month. Interest is to be calculated on the amount utilised at the end of each day and debited to your account at the end of each month. Our Bank's BLR is currently 8.90% per annum.

Rate Of Interest

The next issue taken by the defendant relates to the rate of interest charged. Referring to para 3 of the notice of demand dated 15 April 1998 addressed to the borrower which reads:

> 3. Take note that our client has decided to charge additional interest of 1% per annum on all sums outstanding from the date of this letter.

the defendant pointed out that the 1% interest would actually run from the date of that letter. Prior to the date of that letter the interest would be 3.5% above the BLR as stated in the earlier notice of demand to the borrower dated 27 March 1998. However, referring to para 4 of the plaintiff's notice of demand dated 15 April 1998 to the borrower, the defendant submitted that it would seem the plaintiff was now calculating interest from 9 April 1998. It is therefore pertinent to reproduce para 4 of the said letter which reads as follows:

> 4. On our client's instructions and on their behalf, we hereby demand from you the sum of RM23,668,480.24 which is due and owing under the said overdraft facility as at 8th April 1998 and interest thereon chargeable as follows:
>
> 4.1 on sums owing up to the overdraft limit of RM22,084,000.00 at the rate of 3.5% per annum above our client's Base Lending Rate on monthly rests;
>
> 4.2 on sums owing in excess of the overdraft limit of RM22,084,000.00 at the rate of 4.5% per annum above our client's Base Lending Rate on monthly rests;
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> calculated from 9th April 1998 until 14th April 1998. From 15th April 1998 to the date of full settlement interest will be charged on all outstanding sums at the rate of 4.5% per annum above our client's Base Lending Rate on monthly rests which interest is also hereby demanded.

Therefore the defendant argued that Form 16D as filed and served and which relies on this notice of demand dated 15 April 1998 is bad in law. In *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 FC the Federal Court held that "cause to the contrary" within s. 256(3) of the Code might be established only in three categories of cases: (i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s. 340 of the Code; (ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and (iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity. If no cause to the contrary could be shown, the court would be obliged to make an order for sale. The defendant thus relied on category (ii) to contend cause to the contrary.

In answer to this Mr. W.M. Chang for the plaintiff referred this Court to cl. 52 of the annexure. This clause reads as follows:

52. **COMMITMENT FEE**

The Customer and the Chargor expressly agree and undertake to pay in addition to the interest payable, a commitment fee of one per centum (1%) per annum or at such other rate or rates as may be prescribed by the Bank from time to time on any portion of any overdraft facility unutilised by the Customer and such commitment fee shall be debited to the account of the Customer at the end of each calendar month or such other periods as the Bank may stipulate and be capitalised and added for all purposes to the principal sum then owing and shall thenceforth bear interest at the relevant Prescribed Rate and be secured and payable accordingly and all the covenants and conditions contained in or implied by these presents and all powers and remedies conferred by law or by these presents and all rules of law or equity in relation to the said principal sum and interest shall apply equally to the said commitment fee and to such capitalised arrears of the commitment fee and to interest on such arrears. Further for the purpose of ascertaining whether the limit of the principal intended to be hereby secured has been exceeded or not all accumulated and capitalised commitment fee shall be deemed to be interest and not principal sum.

I was also referred to cl. 53 which reads as follows:

53. **Additional Interest And Default Rate**

53.1 Notwithstanding the provisions herein contained, in the event that the agreed limit on any banking facility stipulated by the Bank shall be exceeded the Bank shall have the absolute right at any time and may from time to time levy or impose an additional interest of one per centum (1%) per annum above the relevant Prescribed Rate or at such other rate as the Bank may at its sole and absolute discretion and from time to time prescribe on any such excess amount calculated on a daily basis with monthly rests.

53.2 In addition and without prejudice to the powers rights and remedies herein conferred, if the Customer and/or the Chargor shall default in the payment on due date of any money payable by the Customer and/or the Chargor from time to time due to the Bank the Customer and/or the Chargor shall pay to the Bank additional interest of one per centum (1%) per annum above the relevant Prescribed Rate or at such other rate as may be prescribed by the Bank from time to time calculated from the date of such default until the date of full payment of the amount thereof with monthly rests as well after as before any demand or judgment and irrespective of whether or not the banker customer relationship between the Bank and the Customer has ceased or been terminated.

All these clauses to my mind do not answer the issue raised by the defendant. Whilst cl. 52 allows the plaintiff to charge a commitment fee of 1% per annum on any portion of any OD facility unutilised by the customer and whereas cl. 53 allows the plaintiff to charge additional interest of 1% per annum on the excess amount when the borrower exceeds the borrowing limit and whereas both these clauses give the plaintiff the absolute discretion to vary or to levy such commitment fee or additional interest, it seems to me that when the plaintiff exercised its discretion and informed the borrower and the defendant by virtue of para. 3 of the said letter that it was intending to exercise its right to impose the 1% "from the date of this letter" which was dated 15 April 1998, to my mind the plaintiff was wrong to have calculated the interest to run from 9 April 1998 as stated in para. 4 of the said letter.

The plaintiff having made a calculated choice of exercising its right to vary or to levy cannot willy-nilly in the same letter take a different stand. The submission of Mr. W.M. Chang that the plaintiff was magnanimous in only charging 1% rather than the 2% based on cls. 52 and 53, cannot detract from the fact that either by default or by providential design the plaintiff has failed to calculate the interest only from 15 April 1998, as it said it would. Clearly therefore having based its statutory demand by way of Form 16D on a notice of demand (letter dated 15 April 1998) that included interest that the plaintiff was not entitled to by choice, that is, from 9 April 1998 to 14 April 1998, the plaintiff's demand was bad in law. The plaintiff's application is therefore dismissed with costs.